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No. 98 334

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1997

MARIS FRIEDLANDER, n/k/a
MARIS FREED,

Petitioner,

V.

AMERICAN ARBITRATION ASSOCIATION,
A New York Not-for-Profit
Corporation and BURTON G. FRIEDLANDER,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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49 pp

QUESTIONS FOR REVIEW

1. Whether the United States District Court below erred in dismissing the Respondents Complaint for lack of [subject matter] jurisdiction by its order of February 12, 1998. See Appendix I-IV, pp. 20(b)-20(d)

2. Whether the United States Court of Appeals for the Seventh Circuit erred by its 3/2/98 order summarily affirming the District Court's order of 2/12/98 summarily dismissing Petitioner's Complaint for lack of jurisdiction. See Appendix V, p. 20(e)

3. Whether the United States Court of appeals for the Seventh Circuit erred in denying Petitioner's Motion To Restrain and to enjoin AAA from proceedings with the Arbitration Proceedings in White Plains, New York by its order of 3/2/98. See Appendix V, p. 20(e)

4. Whether the United States Court of Appeals for the Seventh Circuit by its 3/23/98 order erred in denying Petitioner's Motion for Reconsideration of its 3/2/98 order [filed 3/12/98 by the Petitioner] whereby the 7th Circuit summarily affirmed the District Court's 2/12/98 summary dismissal of Petitioner's action for lack of jurisdiction. See Appendix VI, p. 20(f), 20(g)

PARTIES TO THE PROCEEDINGS

Maris Friedlander, n/k/a Maris Freed, Petitioner [plaintiff in her action in the District Court below]; Appellant in the 7th Circuit appeal; and Petitioner in this Petition for a Writ of Certiorari;

American Arbitration Association [AAA], a New York Not-for-Profit Corporation; and Burton G. Friedlander, an individual [Petitioner's ex-husband]. AAA was the defendant in the District Court below; the Appellee in the Petitioner's appeal to the 7th Circuit; and the Respondent in this Petition;

Burton G. Friedlander was granted leave to intervene [as a defendant] in the Petitioner's District Court action [See App. I-IIIpp.20(b)-20(c); the Appellee in the 7th Circuit; and Respondent here;

The order of February 12, 1998 entered by Judge Harry D. Leinenweber district court below granted the motion of Burton G. Friedlander to intervene as a defendant [in the district court]. On the plaintiff's [Freed] appeal to the Seventh Circuit, Friedlander became the intervenor - appellee in the Seventh Circuit. The February 12, 1998 order permitting Friedlanders intervention in the district court is located in the Appendix, I - III, pp. 20(b)-20(c)

It is not known whether Friedlander, the intervenor, will participate in the Writ of Certiorari proceedings initiated by this Petition.

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OPINIONS BELOW

Opinions below consist of the orders and judgment of the district court and the orders of the United States Court of Appeals/Seventh Circuit each of which is included in the Appendix as:

Appendix I, page 20(b), District Court order [2/12/98] granting the Respondent leave to intervene

Appendix I and II, page 20(c), District Court Minute Order [2/12/98] granting motion of AAA and Friedlander to dismiss Freed's action for lack of subject matter jurisdiction; Petitioner motion to restrain AAA from proceeding in White PLains denied

Appendix IV, page 20(d), District judgment [2/12/98] dismissing the Petitioner's action/lack of jurisdiction

Appendix V, page 20(e), 7th Cir. order [3/2/98], Petitioner motion to restrain AAA from proceeding in White Plains denied; Respondent's motion for sanctions against counsel for the Petitioner denied; summarily affirming district court ruling dismissing Petitioner for no jurisdiction

Appendix VI, page 20(f), 7th Cir. order [3/23/98] denying Petitioner's Motion for Reconsideration and affirming summarily district court dismissal of Petitioner's action

STATEMENT OF JURISDICTION [STATUTORY AND RULE PROVISIONS CONFERRING JURISDICTION]

28 USC §1254(1)

Rule 13 - Rules of the United States Supreme Court

28 USC §2101(c) - provides for a Writ of Certiorari to bringany judgment or decree in a civil action, suit or a proceeding before the Supreme Court for review within 90 days after entry of such judgment or decree.

Rule 13 provides that if a petition for a rehearing is filed [in this case in the Seventh Circuit] the time to file the Petition for a Writ of Certiorari runs from the date of denial of the Petition for Rehearing [Petitioner's Motion for Reconsideration was denied by the Seventh Circuit on March 23, 1998 . This Petition is timely filed.

Review of all district court orders [entered on 2/12/98 is requested - see Appendix I-~~I~~L pages20(b)-20(d)-Review Seventh Circuit orders of 3/2/98 and 3/23/98 is requested - see Appendix V-~~V~~I , pages20(e)-20(g) .

THE CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED HEREIN [Pursuant to RULE 14(f) of the SUPREME COURT RULES] ARE SET OUT IN THE FOLLOWING WITH APPROPRIATE CITATION. THese are not so lengthy to require inclusion in the Appendix [except for New York Arbitration Statute, Ch. 75, CPLR § 7501-7514 which are included in the Appendix VII , pages20(h)-20(n).

They are:

The 14th Amendment to the United States Constitution providing in pertinent part:

AMENDMENT XIV -

Section 1 ... No State shall make or enforce any law which shall oblige the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law.

New York Arbitration Statute, Ch. 75, CPLR §7501 - §7514.

The New York Arbitration Statute is too lengthy to be included here and therefore is included in Appendix VII, pp.20(b) 20(n) That Statute does not provide for omitting grounds and reasons and its evaluation in the Appendix verifies that fact.

FIXING OF LOCALE - AAA RULE 11

"The parties may mutually agree on the locale where arbitration is to be held. If any party requests that the hearing be held in a specific locale, and the other party files no objection thereto within 10 days after notice of the request has been sent to it by the AAA, the locale be the one requested. If a party objects to the locale requested by the other party, the AAA shall have the power to determine the locale."

In the instant case the parties did not fix the locale of the arbitration hearings in their agreement [divorce decree] containing the arbitration clause. AAA fixed the location in White Plains, New York, the location requested by the Respondent, Burton G. Friedlander, in his arbitration demand. Petitioner objected to White Plains as the location in a timely fashion.

In fixing the White Plains location AAA did not give grounds and reasons for so doing though Petitioner asked for them. The Petitioner contends in making its decision, AAA was obligated to give grounds and reasons for its locale decision and that its failure to do so breached its contract with the Petitioner arising from the submission to arbitration, including the payment of substantial filing fees to AAA by the parties; and the obligation to pay substantial fees to the 3 arbitrators selected to conduct the hearings [and administrative and other charges]. She also contends that the governing New York Arbitration Statute does not contain language in any of its separate provisions permitting grounds and reasons to be omitted from an AAA decision.

The Guide to Mediation and Arbitration provides, at page 14 thereof.

"... If the place of arbitration has not been designated in the contract or the Submission to Dispute Resolution, or if the parties have not otherwise notified the AAA of their agreement on locale, it will designate the city in accordance with its rule. Among factors considered are [and ignored by AAA]: [See App VIII, pp.20(o)-20(p)

1) Location of the parties;
2) Location of witnesses and documents;
3) Location of site or place of materials;
4) Consideration of relative costs to the parties;
5) Place of performance of contract;
6) Laws applicable to contract;
7) Places of previous court actions;
8) Location of the most appropriate panel of arbitrators;

AAA urges the parties to respond to the 8 factors.

AAA views those factors as significant in determining locale-Respondent ignored them. AAA proposed the factors and it must be implied AAA must provide grounds and reasons for its locale decision, certainly regarding the factors. If not, why did it propose them?

Contract law has long employed a process by which agreements, though not formalized in writing [Petitioner/AAA agreement] may be "implied." 3A Corbin on Contracts, §561-572A (1960). Explicit contractual provisions may be supplemented by other agreements implied from "the promisors' words and conduct in light of surrounding circumstances. Id. at §562. Appropriately, then, it should be concluded AAA wascontractually obligated to provide grounds and reasons for its decision.

We point out New York case law concerning Arbitration Act, CPLR §7507 [§7501, et seq], held it does not require arbitrators to disreasons for their awards. In the Matter of Reddick V. Carthage Central School District No. 1, 459 NY Supp 2d 156 (1983); In the Matter of Arbitration, Cinebox et al., 264 NY Supp 2d 919 (1965) [AppVII,pp.20(h-n);but this Supreme Court has said otherwise. In Perry V. Sindermann, 408 US 593 (1972) it held a terminated college professor was entitled to an opportunity to prove his claim to job tenure; and his college employer was obligated to afford him a requested hearing where he could be informed of the grounds for his nonretention by the college and challenge their sufficiency.

The Supreme Court emphasized (at p. 595, 408 (US) that when the college Regents issued a press release stating allegations of the professors insubordination, they did not provide him with an official statement of reasons for the nonrenewal of his contract. The majority opinion in Perry (p. 603, 408 US) stated,

> " ... proof [the professor would offer] would obligate college officials to grant a hearing at his request, where he could be informed of the grounds for his nonretention and challenge their sufficiency [a clear exposition of college's obligation to give reasons]. [Emphasis added].

A strong dissent by Justice Brennan [joined in by Justice Douglas] stated he agreed with that portion of the majority opinion requiring that reasons be given, stating:

" ... respondent[s] [were] denied due process when [their] contract[s] [were] not renewed and [they were] not informed of the reasons and given an opportunity to respond." [Emphasis added]. [p.604 of 408 US].

Justice Marshall, dissenting, agreed with the majority, finding need for reasons beirg given, stating:

> "[Professor] brought this suit in Federal District Court claiming that the deision not to rehire him was in retaliation for his public criticism of the policies of the college administration in violation of the First Amendment, and that because the decision was made without giving him a statement of reasons and a hearing, it denied him the due process of law guaranteed by the Fourteenth Amendment." p. 605, 408 US. [Emphasis added].
>
> " ... I would modify the judgment of the Court of Appeals to direct the District Court to enter summary judgment for respondent entitling him to a statement of reasons why his contract was not renewed and a hearing on disputed issues of fact." p. 605, 408 US [Emphasis added].

Clearly, the view of the Supreme Court regarding the need for giving grounds and reasons for decisions overwhelms contrary New York case law and takes precedence over such New York authority.

The subject arbitration proceedings evolve from the New York Arbitration Act, a State law [cited at page 6 hereof], and its interpretation by New York Courts is State action under the Fourteenth Amendment and depriving the Petitioner here of due process thereunder. The interpretation of the New York Courts that arbitrators need not give grounds and reasons for their decisions and by such State action [under the Fourteenth Amendment] is rampant] thereby permitting the Petitioner here to assert the violation of her due process rights under that amendment. [See p. 6 hereof, In the Matter of Reddick and Carthage Central School District, supra, where New York Courts have held that arbitrators need not give grounds and reasons for their decisions]. Arbitrators in the instant case [and those in other arbitration proceedings pursuant to New York law] follow the interpretation of the New York Courts, wrong as it is, and such is clearly State action, the foundation for arguing AND ASSERTING A DUE PROCESS VIOLATION under the Fourteenth Amendment.

Importantly, the instant case on this Petition for a Writ of Certiorari is not merely between Petitioner [Freed] and Respondent [Friedlander] - AAA is a Respondent to these proceedings also [as it was in the district court and in the Seventh Circuit Court of Appeals. Thus, AAA is not only a party, it has been the deciding authority on the question of location [venue] for hearings in White Plains, New York in the arbitration proceedings between Freed/Friedlander, a clear conflict of interest severely tempting its decision.

The arbitrators in the White Plains proceedings should be aware of cases like Perry V. Sindermann, supra, where the Supreme Court supported giving grounds and reasons for decisions, but the arbitrators

have not taken the contrariness of their position into account; nor have they made themselves accountable for their clear, conflict of interest, pervading their duties as arbitrators.

By keeping the instant case in White Plains, they stand to profit handsomely even though the facts clearly supported keeping the arbitration proceedings in Chicago. By refusing to give founds and reasons for their venue decision, they lack accountability for any impropriety which might otherwise pervade their decision. They rely on misguided New York authority. If they gave grounds and reasons their decision can be tested against them, but failing to give essential grounds and reasons, their decision cannot be tested in that time honored manner. They should avoid any appearance of impropriety - they have not done so. These observations are not accusatory but they are suggestive of the need for checks and balances - we are devoid of those safeguards designed for the very purpose of being checks and balances.

I. THE FOLLOWING IS A CONCISE STATEMENT OF THE CASE SETTING OUT THE FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED AND CONTAINING:

Petitioner's counsel challenged AAA' conduct and related matters. She brought the Petitioner's action in the district court claiming AAA's refusal to give the requested grounds and reasons for its location decision [White Plains rather than Chicago where it belonged] was improper, namely: (1) it violated Petitioner's 14th Amend- due process rights [raised in her complaint in the district court- see para. 34, 35, 36 of Count I - App IX, pp.20(q-s); (2) by AAA failing to give grounds and reasons for its location deision, the

Petitioner was confronted with excessive costs and expenses by being required to participate in the arbitration hearings at long distance [when that should not have been thereby obligated to suffer excessive costs and expenses as a result.

AAA refusing to give grounds and reasons to supportits White Plains location decision, deprived the Petitioner from acquiring necessary fact finding with which to challenge AAA' decision.

AAA had acontractual obligation to the Petitioner to provide her with grounds and reasons for its location decision making White Plains, New York the hearings venue.

AAA accepted large filing fees from the parties [$5,000 from Petitioner: and a $2,000 filing fee from Respondent with other large costs and fees to follow]. Having so demanded and accepted such costs and fees with more being required, AAA became obligated to fulfill its end of the bargain - to provide grounds and reasons for its decisions. This it has failed and refused to provide.

The need for resolution of the foregoing matters is both plain and compelling. The Petitioner's evidence is important and relevant.

The United States Court of Appeals for the Seventh Circuit has so far departed from the accepted and usual course of judicial proceedings and in the process has sanctioned such a departure by the district court below. Such requires the exercise of this Supreme Court's supervisory power to rectify the injustice heretofore perpetrated on the Petitioner. Supreme Court Rule 10(a).

AAA publicizes the fact that it provides "Dispute Resolution Worldwide." Such appears on its letterhead [See Appendix VII: X, XI , pp.20(o,p,t,u] as well as on other of its published materials. That being the case, AAA's refusal to provide grounds and reasons extending"worldwide" is a matter of utmost importance, the impact of which is nationally and internationally devastating.

On the front and back covers of its Commercial Arbitration Rules and in its guide, AAA BOLDLY ADVERTISES THAT IT PROVIDES:

"DISPUTE RESOLUTION SERVICES WORLDWIDE"

BUT IT DOES NOT TELL A PROSPECTIVE ARBITRATION PARTICIPANT THAT IT WILL NOT PROVIDE GROUNDS AND REASONS FOR ITS DECISIONS.

II. Review of a judgment of a United States Court of Appeals [7th Cir. here] is sought. The basis for federal jurisdiction with the Court of first instance [US Dist. Court, Northern Dist. of Illinois, Eastern Division] is:

In personam jurisdiction was acquired by diversity of citizenship between Maris Freed [Petitioner]; and AAA and Burton G. Friedlander [Respondents] pursuant to 28 USC 1332(a)(2). See para. 1-38, Count I of complaint -App. XI ; pages 20(q,r,s).

III. The following is a direct and concise argument amplifying the reasons relied on FOR ALLOWANCE OF THE WRIT.

A United States Court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court [See United States Supreme Court Rule 10(c)].

Petitioner was deprived of due process; AAA's breach of its obligations to and contract with Petitioner whereby it is obligated thereby to provide her with grounds and reasons for its White Plains location decision.

IV. In the instant case AAA strongly resists giving grounds and reasons for its decision to locate the hearings in White Plains, New York because it cannot justify its decision on the facts and circumstances involved - it is just that bad. Petitioner is surely entitled to know the grounds and the reasons for that decision by AAA as it was contractually obligated to provide her with those grounds and reasons.

While we do not argue the factual circumstances of the decision to locate the arbitration hearings in White Plains as that is contrary to proceeding by thisWrit of Certiorari, we do challenge AAA's refusal to give grounds and reasons as that is the basic issue of this petition. Permitting AAA to operate that way is detrimental to those engaging in arbitration. The invitation to impropriety by AAA is high so long as they do not have to account for their decisions.

Petitioner cannot know what facts AAA relied on to reach its White Plains decision because they refuse to tell her the grounds and reasons for its location decision.

With a worldwide capability to offer and fulfill "dispute Resolution Services," [it advertises such ability in its various publications] and it has

enormous power and resources to impact upon dispute resolution of large sums of money. Such authority imposes and impacts greatly upon the public at large, individual, commercial and industrial enterprises among them, without giving grounds and reasons for its decisions. AAA is, therefore, immune from the checks, balances and controls otherwise available in adversary proceedings. One is unable to challenge what one does not know.

The devastating impact of AAA denying grounds and reasons permits it, perhaps not intentionally, but at least unwittingly, to render meritless decisions. Often times, as here, those making such decisions are not lawyers skilled in discerning facts [the person who initially ruled that White Plains was the proper location for hearings (venue) was not a lawyer]. Skill is required to weigh and test facts to achieve a proper result; let alone the need for ability to reason the law, a capability unavailable to one unskilled in it.

Here AAA refused, and continues to refuse to give grounds and reasons for its decision, that being a "worldwide" policy for its decision making. What if this Court refused to provide grounds and reasons for its decisions? The result? anarchy, the rule of law would have no meaning as litigants would be disenfranchised from knowing why and how a particular result was achieved. Intolerable to say the least breeding much dissatisfaction in the loser.

On January 22, 1998, Petitioner's counsel spoke with Mr. Manulkin of AAA

> in New York City [a non-lawyer] AAA staff member who initially decided the locale question. He retained hearings in White Plains, "I would not and could not tell you the grounds and reasons [for my White Plains location decision]; and I am not permitted by the AAA to do that. I based my decision on the entire record but I can't tell you the grounds and reasons for that."

Petitioner appealed Mr. Manulkin's location decision to AAA at its main office in New York and the same result occurred - White Plains remained the hearing location.

On February 3, 1998, Kaplan spoke with AAA's Mr. Zotto (a lawyer who handled Petitioner's appeal) and questioned the appeal decision. Mr. Zotto told Kaplan in almost script like language [used by Mr. Manulkin],

> "I would not and could not tell [you] the grounds and reasons for affirming the retention of the hearing locale in White Plains and not Chicago; and that AAA does not permit me to give grounds and reasons for my decision. I based my decision on the entire record. I cannot be more specific."

V. AAA's policy is outrageous. They charge excessive fees, etc. imposed on parties to arbitration proceedings most unfairly. Petitioner paid a $5,000 filing fee to AAA for the arbitration proceedings [based on her $800,000 plus claim against Respondent, Burton G. Friedlander, for back alimony, etc.] Filing fees for an action in the District Court are only $150 regardless of the amount one seeks to recover and for that nominal amount, a competent Judge and a jury are available.

Friedlander paid a $2,000 filing fee to AAA.

Because of the amount sought by Petitioner, 3 arbitrators are required for the hearings [why not one but AAA rules do not so provide] [in such circumstances] each of whom will be paid $600 per day for what appears to be a 3 day hearing. That cost is $5,400 or more [depending on which arbitrators are selected from the pool of them, some of them receive as much as $2,500 per day. If that were the case, the cost just for arbitrators. would be $7,500 per day, or a total of $22,500 or more].

AAA imposes a $250 per hearing day administrative charge on each party - another $1,500 charge. What does this cover? When Kaplan queried AAA about this they would not tell him.

Regardless, AAA sells a bill of goods to the public publicizing cheaper, quicker "justice" it dispenses. Such does not exist.

For the exorbitant charges AAA extracts from parties, one is entitled to be provided with grounds and reasons for its decisions, an obligation imposed on AAA to do so by contract by accepting and charging for the arbitration proceedings and agreeing to hear and decide them.

AAA's White Plains location decision is much in error but by refusing to give grounds and reasons for that decision, it "conveniently" avoids revealing the error of its decision. Additionally, the appointed arbitrators work out of White Plains, a sinecure for them for very remunerative work. It is not the basis of this Writ to litigate venue as our purpose is only to object to AAA's decision method, a violation of due process.

Fulfilling AAA's obligation to give grounds/ reasons is a check and balance, a safeguard against improvident, arbitrary and capricious conduct. Failure to do so is a temptation to render improper decisions.

VI. We have set forth the questions presented for review heretofore [see page i], and offer comments on some of them:

On 2/12/98 the District Court erred ~~in~~ dismissing Respondent's Complaint for lack of subject matter jurisdiction. Additional support for finding that the Court erred is found in the violation of Petitioner's 14th Amendment due process rights.

On 3/2/98 the 7th Circuit erred in summarily affirming Dist. Ct. 2/12/98 order.

The 7th Circuit cited 2 cases in support of 3/2/98 order summarily affirming the District Court, Mather v. Village of Mundelein, 869F. 356, 357 (7th Cir., 1989 - per curiam); and Taylor v. City of New Albany, 979F 2d 87,(7th Cir. 1992), cert. denied 506 US 1085 (1993). Both of these cases are clearly distinguishable from the instant case.

In Mather the Court acted on the full record, without full briefing but heard oral argument [not permitted Petitioner]. The Mather facts lacked the overwhelming and "worldwide" impact of AAA's [mis] conduct here. In Mather a village resident challenged the very constitutionality of a creche in a holiday display in front of the village hall. The 7th Circuit reversed the District Court ruling which found a violation of the establishment clause. Mather determines circumstances occurring at one time and one place with minimal affectation on others and can't match the "worldwide" impact and influence of the instant case. At least the Mather Court heard oral argument, an important substitute for briefing.

In Taylor the Court considered a request for leave to proceed as a pauper, the 7th Circuit holding that the issues involved were insubstantial and that briefs would not be helpful to the Court's consideration. In the instant case the issues are overwhelming, as impact is worldwide affecting all aspects of legal involvement regarding personal rights, business, commerce and industry. Pleading as a pauper in Taylor concerns one individual, a factual matter and its mandate does not deprive others with different facts from pleading as a pauper where the facts permit such treatment. Taylor is not authority for the instant case.

What AAA does is broad and all pervasive with its overwhelming worldwide effect. Petitioner should have been permitted to brief and argue her case, especially considering its extreme impact over so many. Courts give grounds and reasons for their decisions as the many cases in the various reprts indicate. This Supreme Court gives grounds and reasons for its decisions.

While we believe the Seventh Circuit should have restrained and enjoined AAA from proceeding in White Plains, at least until matters could be sorted out in this very unique set of circumstances, we shall leave that matter for now since if this Petition is granted those circumstances can be considered at that time.

The Seventh Circuit should have granted Petitioner's March 12, 1998 Motion for Reconsideration based on the foregoing arguments, at least to permit briefing and oral argument.

VII
CONCLUSION

The Petitioner reiterates that the need for resolution of the foregoing matters is both plain and compelling. The Court's supervisory power is required to be employed to rectify the injustice imposed on arbitration participants worldwide by virtue of AAA refusing to give grounds and reasons for its decisions when this Court has frowned on such conduct [see Perry V. Sindermann, 408 US 593 (1972) at pages 6-8 of this Petition which held grounds and

reasons were necessary].

AAA engages in "Dispute Resolution Worldwide" and the scope of its power in rendering decisions in such a silent and secret manner employed by it is devastating to arbitration participants.

Such is not justice and this Court has so recognized. AAA's methods are severely and unilaterally imposed on its participants by forcing them to accept its decisions without being apprised of the basis for them. Such is intolerable.

Arbitration participants pay most handsomely for the "privilege" and for that they receive potentially defective justice an unpleasant and unworkable arrangement, which they did not bargain for when they entered into an arbitration arrangement. They paid money in return for services, a contractual relationship, honored to the fullest extent by the arbitration participants, but certainly not by AAA. The highest Court in the land has literally said so in Perryman. The scope of AAA's "worldwide" activities demand greater controls, greater checks and balances, remembering that a large number of non-lawyers, unschooled and unskilled hear matters they are called upon to decide. The most that can be secured from so imperfect a "resolution" of disputes service is "justice by accident." The Petitioner here is entitled to more than that for the thousands of dollars she has and will pay to bring her particular arbitration proceedings to a conclusion - and she will never have the benefit of knowing why the decision that will be entered will be so for what reason.

We therefore respectfully ask this Honorable and Highest Court in the land to

grant Petitioner's Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI SUBMITTED BY THE PETITIONER MARIS FRIEDLANDER, n/k/a MARIS FREED

This Appendix is submitted pursuant to Rule 14, 1. (i) and sub-para thereof of the Rules of the United States Supreme Court

APPENDIX I

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Judge Harry D. Leinenweber

Case No. 98 C 762

Maris Friedlander V. American Arbitration Association

Plaintiff's Emergency Motion to Restrain and enjoin AAA from Proceeding With Arbitration Hearings in White Plains NY-2/12/98

Plaintiff's motion denied. Burton G. Friedlander's Motion to Intervene granted.- 2/12/98

Oral motions of AAA and Friedlander to dismiss for lack of jurisdiction is granted.-2/12/98

APPENDIX II
and III UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Michael W. Dobbins
Clerk

Office of
the Clerk

Case Number 1:98-cv-00762

Title: Friedlander V. American
Arbitration Association

Assigned Judge: Honorable Harry D.
Leinenweber

MINUTE ORDER of 2/12/98 by Hon. Harry D. Leinenweber: Motion to Restrain AAA proceeding with arbitration hearings in White Plains, New York denied [2-1] and for other relief denied [2-2]. Burton G. Friedlander's motion to intervene is granted [3-1]. The oral motions by American Arbitration Association and Mr. Friedlander to dismiss for lack of jurisdiction is granted [0-1]. terminating case, Mailed Notice.

This docket entry was made by the clerk on February 17, 1998.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MARIS FRIEDLANDER N/K/A MARIS FREED

V.

AMERICAN ARBITRATION ASSOCIATION

JUDGMENT IN A CIVIL CASE

Case Number 98C762

This action came on for hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the oral motions by defendant American Arbitration Association and Burton G. Friedlander to dismiss for lack of jurisdiction is granted.

APPENDIX V

20(e)

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

March 2, 1998

Before

Hon. RICHARD A. POSNER, *Chief Judge*

Hon. WILLIAM J. BAUER, *Circuit Judge*

Hon. FRANK H. EASTERBROOK, *Circuit Judge*

MARIS FRIEDLANDER, now Kneely/as, MARIS FREED, Plaintiff-Appellant,	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
98-1337 v.	
AMERICAN ARBITRATION ASSOCIATION, INCORPORATED, Defendant-Appellee, and, BURTON G. FRIEDLANDER, Intervenor-Appellee.	No. 98C762
	Harry D. Leinenweber, Judge

The following are before the Court:

1. EMERGENCY MOTION TO RESTRAIN AND ENJOIN FROM PROCEEDING WITH ARBITRATION HEARINGS IN WHITE PLAINS, NEW YORK AND FOR OTHER RELIEF, filed on February 17, 1998, by counsel for the appellant.

2. RESPONSE OF APPELLEE BURTON G. FRIEDLANDER TO EMERGENCY MOTION TO RESTRAIN AND ENJOIN AAA FROM PROCEEDING WITH ARBITRATION HEARINGS IN WHITE PLAINS, NEW YORK AND FOR OTHER RELIEF AND APPELLEE'S MOTION FOR SANCTIONS PURSUANT TO RULE 38 OF THE FEDERAL RULES OF APPELLATE PROCEDURE AND THE RULES OF THIS COURT, filed on February 17, 1998, by counsel.

IT IS ORDERED that #1 is DENIED. INSOFAR AS #2 requests sanctions, IT IS ORDERED that #2 is DENIED.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

March 23, 1998

Before

Hon. RICHARD A. POSNER, *Chief Judge*

Hon. WILLIAM J. BAUER, *Circuit Judge*

Hon. FRANK H. EASTERBROOK, *Circuit Judge*

MARIS FRIEDLANDER, now known as, MARIS FREED, Plaintiff-Appellant,	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 98-1337 AMERICAN ARBITRATION ASSOCIATION, INCORPORATED, Defendant-Appellee, and BURTON G. FRIEDLANDER, Intervenor-Appellee.	No. 98C762 Harry D. Leinenweber, Judge

Upon consideration of the MOTION FOR RECONSIDERATION filed on March 12, 1998, by counsel for the appellant,

IT IS ORDERED that the motion is DENIED.

This court has carefully reviewed the final order of the district court, the record on appeal and the appellant's motion. Based on this review, the court has determined that any issues that could be raised are insubstantial and the filing of briefs would not b e helpful to the court's consideration of the of the issues. See Mather V. Village of Mundelein, 869 F 2d 356, 357 (7th Cir. 1989) (per curiam) (court can decide case on motions, papers and record where briefing would be a waste of time and no member of the panel desires briefing or argument.

Accordingly, IT IS ORDERED that the district court is summarily AFFIRMED. Taylor V. City of New Albany, 979 F 2d 87 (7th Cir. 1992) cert. denied, 506 US 1085 (1993).

EXHIBIT VII

New York Arbitration Statute, Ch. 75, CPLR 7501-7514

§ 7501. Effect of arbitration agreement

A written agreement to submit any controversy thereafter arising or any existing controversy to arbitration is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award. In determining any matter arising under this article, the court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute.

L.1962, c. 308; amended L.1963, c. 532, § 47.

§ 7502. Applications to the court; venue; statutes of limitation; provisional remedies

(a) Applications to the court; venue. A special proceeding shall be used to bring before a court the first application arising out of an arbitrable controversy which is not made by motion in a pending action. The proceeding shall be brought in the court and county specified in the agreement; or, if none be specified, in a court in the county in which one of the parties resides or is doing business, or, if there is no such county, in a court in any county; or in a court in the county in which the arbitration was held. All subsequent applications shall be made by motion in the pending action or the special proceeding.

(b) Limitation of time. If, at the time that a demand for arbitration was made or a notice of intention to arbitrate was served, the claim sought to be arbitrated would have been barred by limitation of time had it been asserted in a court of the state, a party may assert the limitation as a bar to the arbitration on an application to the court as provided in section 7503 or subdivision (b) of section 7511. The failure to assert such bar by such application shall not preclude its assertion before the arbitrators, who may, in their sole discretion, apply or not apply the bar. Except as provided in subdivision (b) of section 7511, such exercise of discretion by the arbitrators shall not be subject to review by a court on an application to confirm, vacate or modify the award.

(c) Provisional remedies. The supreme court in the county in which an arbitration is pending, or, if not yet commenced, in a county specified in subdivision (a), may entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitrable controversy, but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief. The provisions of articles 62 and 63 of this chapter shall apply to the application, including those relating to undertakings and to the time for commencement of an action (arbitration shall be deemed an action for this purpose) if the application is made before commencement, except that the sole ground for the granting of the remedy shall be as stated above. The form of the application shall be as provided in subdivision (a).

(As amended L.1985, c. 253, § 1.)

§ 7503. Application to compel or stay arbitration; stay of action; notice of intention to arbitrate

(a) Application to compel arbitration; stay of action. A party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration. Where there is no substantial question whether a valid agreement was made or complied with, and the claim sought to be arbitrated is not barred by limitation under subdivision (b) of section 7502, the court shall direct the parties to arbitrate. Where any such question is raised, it shall be tried forthwith in said court. If an issue claimed to be arbitrable is involved in an action pending in a court having jurisdiction to hear a motion to compel arbitration, the application shall be made by motion in that action. If the application is granted, the order shall operate to stay a pending or subsequent action, or so much of it as is referable to arbitration.

(b) Application to stay arbitration. Subject to the provisions of subdivision (c), a party who has not participated in the arbitration and who has not made or been served with an application to compel arbitration, may apply to stay arbitration on the ground that a valid agreement was not made or has not been complied with or that the claim sought to be arbitrated is barred by limitation under subdivision (b) of section 7502.

(c) Notice of intention to arbitrate. A party may serve upon another party a demand for arbitration or a notice of intention to arbitrate, specifying the agreement pursuant to which arbitration is sought and the name and address of the party serving the notice, or of an officer or agent thereof if such party is an association or corporation, and stating that unless the party served applies to stay the arbitration within twenty days after such service he shall thereafter be precluded from objecting that a valid agreement was not made or has not been complied with and from asserting in court the bar of a limitation of time. Such notice or demand shall be served in the same manner as a summons or by registered or certified mail, return receipt requested. An application to stay arbitration must be made by the party served within twenty days after service upon him of the notice or demand, or he shall be so precluded. Notice of such application shall be served in the same manner as a summons or by registered or certified mail, return receipt requested. Service of the application may be made upon the adverse party, or upon his attorney if the attorney's name appears on the demand

for arbitration or the notice of intention to arbitrate. Service of the application by mail shall be timely if such application is posted within the prescribed period. Any provision in an arbitration agreement or arbitration rules which waives the right to apply for a stay of arbitration is hereby declared null and void.

L.1962, c. 308; amended L.1964, c. 388, § 28; L.1973, c. 1028, § 1.

§ 7504. Court appointment of arbitrator

If the arbitration agreement does not provide for a method of appointment of an arbitrator, or if the agreed method fails or for any reason is not followed, or if an arbitrator fails to act and his successor has not been appointed, the court, on application of a party, shall appoint an arbitrator.

L.1962, c. 308.

§ 7505. Powers of arbitrator

An arbitrator and any attorney of record in the arbitration proceeding has the power to issue subpoenas. An arbitrator has the power to administer oaths.

L.1962, c. 308.

§ 7506. Hearing

(a) **Oath of arbitrator.** Before hearing any testimony, an arbitrator shall be sworn to hear and decide the controversy faithfully and fairly by an officer authorized to administer an oath.

(b) **Time and place.** The arbitrator shall appoint a time and place for the hearing and notify the parties in writing personally or by registered or certified mail not less than eight days before the hearing. The arbitrator may adjourn or postpone the hearing. The court, upon application of any party, may direct the arbitrator to proceed promptly with the hearing and determination of the controversy.

(c) **Evidence.** The parties are entitled to be heard, to present evidence and to cross-examine witnesses. Notwithstanding the failure of a party duly notified to appear, the arbitrator may hear and determine the controversy upon the evidence produced.

(d) Representation by attorney. A party has the right to be represented by an attorney and may claim such right at any time as to any part of the arbitration or hearings which have not taken place. This right may not be waived. If a party is represented by an attorney, papers to be served on the party shall be served upon his attorney.

(e) Determination by majority. The hearing shall be conducted by all the arbitrators, but a majority may determine any question and render an award.

(f) Waiver. Except as provided in subdivision (d), a requirement of this section may be waived by written consent of the parties and it is waived if the parties continue with the arbitration without objection.

L.1962, c. 308.

§ 7507. Award; form; time; delivery

Except as provided in section 7508, the award shall be in writing, signed and affirmed by the arbitrator making it within the time fixed by the agreement, or, if the time is not fixed, within such time as the court orders. The parties may in writing extend the time either before or after its expiration. A party waives the objection that an award was not made within the time required unless he notifies the arbitrator in writing of his objection prior to the delivery of the award to him. The arbitrator shall deliver a copy of the award to each party in the manner provided in the agreement, or, if no provision is so made, personally or by registered or certified mail, return receipt requested.

As amended L.1981, c. 962, § 1.)

§ 7508. Award by confession

(a) When available. An award by confession may be made for money due or to become due at any time before an award is otherwise made. The award shall be based upon a statement, verified by each party, containing an authorization to make the award, the sum of the award or the method of ascertaining it, and the facts constituting the liability.

(b) Time of award. The award may be made at any time within three months after the statement is verified.

(c) Person or agency making award. The award may be made by an arbitrator or by the agency or person named by the parties to designate the abitrator[1].

L.1962, c. 308.

[1] So in original. Probably should be "arbitrator".

§ 7509. Modification of award by arbitrator

On written application of a party to the arbitrators within twenty days after delivery of the award to the applicant, the arbitrators may modify the award upon the grounds stated in subdivision (c) of section 7511. Written notice of the application shall be given to other parties to the arbitration. Written objection to modification must be served on the arbitrators and other parties to the arbitration within ten days of receipt of the notice. The arbitrators shall dispose of any application made under this section in writing, signed and acknowledged by them, within thirty days after either written objection to modification has been served on them or the time for serving said objection has expired, whichever is earlier. The parties may in writing extend the time for such disposition either before or after its expiration.

L.1962, c. 308.

§ 7510. Confirmation of award

The court shall confirm an award upon application of a party made within one year after its delivery to him, unless the award is vacated or modified upon a ground specified in section 7511.

L.1962, c. 308.

§ 7511. Vacating or modifying award

(a) When application made. An application to vacate or modify an award may be made by a party within ninety days after its delivery to him.

(b) Grounds for vacating.

1. The award shall be vacated on the application of a party who either participated in the arbitration or was served with a notice of intention to arbitrate if the court finds that the rights of that party were prejudiced by:

(i) corruption, fraud or misconduct in procuring the award; or

(ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or

(iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or

(iv) failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection.

2. The award shall be vacated on the application of a party who neither participated in the arbitration nor was served with a notice of intention to arbitrate if the court finds that:

(i) the rights of that party were prejudiced by one of the grounds specified in paragraph one; or

(ii) a valid agreement to arbitrate was not made; or

(iii) the agreement to arbitrate had not been complied with; or

(iv) the arbitrated claim was barred by limitation under subdivision (b) of section 7502.

(c) Grounds for modifying. The court shall modify the award if:

1. there was a miscalculation of figures or a mistake in the description of any person, thing or property referred to in the award; or

2. the arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or

3. the award is imperfect in a matter of form, not affecting the merits of the controversy.

(d) Rehearing. Upon vacating an award, the court may order a rehearing and determination of all or any of the issues either before the same arbitrator or before a new arbitrator appointed in accordance with this article. Time in any provision limiting the time for a hearing or award shall be measured from the date of such order or rehearing, whichever is appropriate, or a time may be specified by the court.

(e) Confirmation. Upon the granting of a motion to modify, the court shall confirm the award as modified; upon the denial of a motion to vacate or modify, it shall confirm the award.

L.1962, c. 308.

EXHIBIT VII

§ 7512. Death or incompetency of a party

Where a party dies after making a written agreement to submit a controversy to arbitration, the proceedings may be begun or continued upon the application of, or upon notice to, his executor or administrator or, where it relates to real property, his distributee or devisee who has succeeded to his interest in the real property. Where a committee of the property or of the person of a party to such an agreement is appointed, the proceedings may be continued upon the application of, or notice to, the committee. Upon the death or incompetency of a party, the court may extend the time within which an application to confirm, vacate or modify the award or to stay arbitration must be made. Where a party has died since an award was delivered, the proceedings thereupon are the same as where a party dies after a verdict.

L.1962, c. 308.

§ 7513. Fees and expenses

Unless otherwise provided in the agreement to arbitrate, the arbitrators' expenses and fees, together with other expenses, not including attorney's fees, incurred in the conduct of the arbitration, shall be paid as provided in the award. The court, on application, may reduce or disallow any fee or expense it finds excessive or allocate it as justice requires.

L.1962, c. 308.

§ 7514. Judgment on an award

(a) Entry. A judgment shall be entered upon the confirmation of an award.

(b) Judgment-roll. The judgment-roll consists of the original or a copy of the agreement and each written extension of time within which to make an award; the statement required by section 7508 where the award was by confession; the award; each paper submitted to the court and each order of the court upon an application under sections 7510 and 7511; and a copy of the judgment.

L.1962, c. 308; amended L.1963, c. 532, § 48; L.1964, c. 388, § 29.

EXHIBIT VII 20(o)

AMERICAN ARBITRATION ASSOCIATION
Dispute Resolution Services Worldwide

December 8, 1997

Steven J. Stein, Esq.
Kay Collyer & Boose LLP
One Dag Hammarskjold
New York, NY 10017

Maris Friedlander
2845 Farmington Road
Northbrook, Il 60062

Re: 19 170 00152 97
Burton G. Friedlander
and
Maris Freed Friedlander

Dear Parties:

This will acknowledge receipt of a letter from Mr. Stein dated December 5, 1997 indicating that the Respondent is objecting to the locale requested by by Claimant. We note that a copy of said letter has been sent to Respondent.

We note that the arbitration clause in your contract does not designate the locale where the hearing is to be held. In accordance with Section 11 of the Rules, the Association is authorized to fix such locale. Listed below are factors that the parties may wish to raise, which the Association views as significant in determining locale:

1) location of parties;
2) Location of witnesses and documents;
3) Location of site or place of materials;
4) Consideration of relative cost to

5) Place of performance of contract;
6) Laws applicable to the contract;
7) Place of previous court actions;
8) Location of most appropriate panel of arbitrators.

We request that each party present its arguments in favor of any preferred locale of the arbitration hearings. Such contentions should be filed with this office in duplicate, and a copy simultaneously sent to the opposing party, within ten (10) days of the date of this letter.

Very truly yours,

/s/ Nancy Owen
Case Administrator
914-946-1119

had for arbitration. The Association ignored the foregoing and refused to advise Freed how it fits its White Plains location decision.

COUNT I

Maris Freed repeats and realleges para. 1-30 of the preceding allegations as para. 1-30 of this Count I.

31. Freed submitted objections to the Association locating arbitration hearings in White Plains as well as an affidavit verifying the matters required to locate such hearings in Chicago; a motion to deny and dismiss Friedlander's request for a White Plains hearing location; a Appeal and Request for Reconsideration of the Association retaining White Plains as a hearing location; along with other submissions all of which substantiate Chicago as the appropriate hearing locale.

32. On January 21, 1998 AAA notified the parties by fax that it had determined that White Plains is the locale for the hearings [See Ex. 3 hereto]. On January 24, 1998 Freed faxed her appeal to that decision to AAA in White Plains and on January 26, 1998 she faxed that appeal to Stein [See Ex. 5 hereto]. On January 29, 1998 Freed replied by fax to AAA in White Plains to Stein's response to the said appeal and by mail to Stein [See Ex. 6 hereto]. On February 3, 1998 AAA notified the parties by fax that the locale for hearings would remain in White Plains, thereby denying Freed's appeal. [See

33. Exhibit 5, the Association's decision to retain the locale in White Plains by Mr. Manulkin, such duties.

34. On January 22, 1998 Kaplan spoke with Manulkin about his decision to retain White Plains as the hearing locale [Ex. 3 hereto].

Kaplan conferred with Manulkin and questioned him about his decision and asked him what the grounds and reasons were for his decision and his refusal to recommend transfer of the hearing to Chicago. In particular, Kaplan asked Manulkin to state the grounds and reasons for his decision and Manulkin said,

> "I would not and could not tell you the grounds and reasons and I am not permitted by the AAA to do that. I based my decision on the entire record but I can't tell you the grounds and reasons for that."

Kaplan told Manulkin that his decision to retain the hearing in White Plains was improper and was arbitrary and capricious and interfered with Freed's submitting an effective appeal; and explained to Manulkin that his and the Association's refusal to give the grounds and reasons for the decision was unconstitutional and violated Freeds' due process rights.

35. AAA is not empowered to render decisions for just any reason or no reason that suited it revealing the grounds and reasons for its decision. For the AAA to function in that manner is illegal and violative of Freed's appeal to AAA and her"constitutional and due process rights and privileges;" and Mr. Manulkin's decision and the manner and procedures he followed in connection therewith violates every standard of dispute resolution.

36. Freed is not attacking AAA's decision per se, but rather, the unconstitutional and illegal procedural methods it employed to arrive at its decision and particularly the depivation of due process it imposed on Freed. On that basis AAA authored an illegal decision.

37. On February 3, 1998 Kaplan conferred with Mr. Frank Zatto, a higher authority of

AAA in its New York City offices concerning Ex. 4 hereto [the 2/3/98 decision to retain White Plains as the hearing locale]. Kaplan questioned Mr. Zatto along the same lines as he had previously questioned Mr. Manulkin and received the same response, namely:

> "he would not and could not tell me his grounds and reasons for affirming the retention of the hearing locale in White Plains and not Chicago; and that AAA does not permit me to give grounds and reasons for my desion. I have based my decision on the entire record. I cannot be more specific."

38. AAA's refusal to provide Freed with grounds and reasons for its locale decision for hearings to b e held in White Plains and not Chicago comprised the tort in Illinois derived from its illegal, unconstitutional conduct and deprivation of Freeds due process rights and privileges.

WHEREFORE, Maris Freed, plaintiff, prays for judgment in her favor and against American Arbitration Association as follows:

(1) For a finding reversing AAA's decision locating the arbitration hearing in Case No. 19 170 00 152 97 in White Plains;

EXHIBIT VII 20(t)

American Arbitration Association
Dispute Resolution Services Worldwide

January 21, 1998

399 Knollwood Road
Suite 116
White Plains, NY 10603
914-946-1119;
914-946-2661 fax

Steven J. Stein, Esq
Kay Collyer & Boose LLP
One Dag Hammarskjold Plaza
New York, NY 10017

Edward Kaplan, Esq
Edward Kaplan & Associates
350 N LaSalle St, Suite 800
Chicago, IL 60610

Re: 19 170 00152 97
Burton G. Friedlander
and
Maris Freed Friedlander

Dear Parties:

The Association after carefully considering the contentions of the Parties, has determined in accordance with the Rules, that the appropriate locale for hearings in this matter is White Plains, New York.

In accordance with Section 13 of the Rules, the Association encloses herewith a list of ten (10) names selected from its panel from which one arbitrator is to be appointed. Also, enclosed are calendar forms to ascertain your available dates for hearing as well as the time you anticipate will be necessary to present your case. If the list and calendar forms are not returned by January 31, 1998, all names and dates will be deemed acceptable, the appointment of an arbitrator will be made as authorized in Section 13 and hearings will be scheduled.

Very truly yours,

/s/ Nancy Owen
Case Administrator

EXHIBIT VII 20(u)

American Arbitration Association
Dispute Resolution Services Worldwide

399 Knollwood Road
Suite 116
White Plains, NY 10603
914-946-1119
914-946-2661 fax

February 3, 1998

Steven J. Stein, Esq
Kay Collyer & Boose LLP
One Dag Hammarskjold Plaza
New York, NY 10017

Edward Kaplan, Esq
Edward Kaplan & Associates
350 N LaSalle St, Suite 800
Chicago, IL 60610

Re: 19 170 00152 97
Burton G. Friedlander
and
Maris Freed Friedlander

via fax and regular mail

Dear Parties:

The Association, after carefully considering the contentions of the Parties, has determined in accordance with the Rules, that the appropriate locale for hearings in this matter is White Plains, New York.

Therefore we ask that the parties return the list of potential panelists, previously submitted on January 21, 1998, by February 6, 1998. If the list and calendar forms are not received by that date all names and dates will be deemed acceptable, the appointment of three (3) arbitrators will be made as authorized in Section 13 and a hearing will be scheduled.

Very truly yours,
/s/ Nancy Owen
Case Administrator

Supreme Court, U.S.
FILED
SEP 25 1998
OFFICE OF THE CLERK

No. 98-334

In The

Supreme Court of the United States

October Term, 1997

MARIS FREED (f/k/a "MARIS FRIEDLANDER"),

Petitioner,

vs.

AMERICAN ARBITRATION ASSOCIATION, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION FOR RESPONDENT BURTON G. FRIEDLANDER

WILLIAM R. KUTNER
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27 pp

RESPONDENT BURTON G. FRIEDLANDER'S RESTATEMENT OF QUESTIONS PRESENTED

1. Did the United States District Court for the Northern District of Illinois err when it dismissed this civil action for want of subject matter jurisdiction?

2. Did the United States Court of Appeals for the Seventh Circuit err when it affirmed the Judgment of the District Court?

3. Did the United States Court of Appeals for the Seventh Circuit err or abuse its discretion when it denied Petitioner's motion for an order enjoining and restraining the American Arbitration Association from proceeding with the arbitration at White Plains, New York?

4. Did the United States Court of Appeals for the Seventh Circuit err when it denied Petitioner's motion for a rehearing?

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STATEMENT OF JURISDICTION

Petitioner seeks to invoke this Court's appellate jurisdiction pursuant to 28 U.S.C. § 1254(1). As is set forth in Point I of Respondent's Argument, *infra,* Petitioner fails to do so properly because she did not serve her papers upon Respondent BURTON G. FRIEDLANDER within the time limited therefor by a controlling statute (28 U.S.C. § 2101[c]) and applicable Rules of this Court (Rules 13.2, 13.3, and 29.3). This Court should therefore decline to consider any of the questions raised in the Petition for lack of jurisdiction.

STATEMENT OF THE CASE

The controversy underlying this Petition arises from the 1978-79 dissolution of the marriage of Petitioner, MARIS FREED (who was formerly known as "MARIS FRIEDLANDER"), to Respondent BURTON G. FRIEDLANDER. Twenty years ago the parties agreed to arbitrate all disputes that might arise between them in the future. In December of 1996, however, Petitioner attempted, without success, to avoid her agreement to arbitrate. Having failed to do so, she commenced this civil action to compel the arbitral forum to change the "locale" (or "venue") of such an arbitration from White Plains, New York to Chicago, Illinois, which she prefers.

A. Factual Summary

More than 20 years ago, on August 30, 1978, Petitioner commenced an action against Respondent BURTON G. FRIEDLANDER in the Supreme Court of the State of New York, County of Westchester, for a divorce and ancillary relief (the "Matrimonial Action"). Just 10 weeks later, on or about November 15, 1978, represented by separate New York law

firms, Petitioner and Respondent BURTON G. FRIEDLANDER entered into a written agreement (the "Stipulation") in which they agreed, among other things, as follows:

> (1) This Agreement shall be governed by and construed and enforced in accordance with the laws of the State of New York. (Art. VII, par. 3)
>
> (2) In the event any dispute over the construction or application of this Agreement cannot be resolved between the parties, the sole remedy other than that of confirming and enforcing an award shall be that of arbitration under the then current rules of the American Arbitration Association. . . . (Art. XV)

In early 1979, Petitioner moved for a judgment of divorce based on the terms of the Stipulation. Respondent BURTON G. FRIEDLANDER did not oppose her application.

On April 10, 1979, a Justice of Supreme Court, Westchester County, made findings of fact and conclusions of law, and stated them in a paper entitled "FINDINGS AND JUDGMENT" (the "Judgment"). The Judgment was "entered" on April 13, 1979. All the terms of the Stipulation, including the choice-of-law provision quoted above and the arbitration provision quoted in part above, were judicially-approved and expressly incorporated by reference in the Judgment. As further agreed by the parties (in Art. IV), the Stipulation did not "merge[ ]" in the Judgment and was deemed to "survive" the entry of the Judgment.

From April 13, 1979 until December 18, 1996 — a period of more than 17 years — there was no arbitration, no litigation, and no proceeding of any other type to resolve any dispute between the parties.

On December 19, 1996, more than 18 years after Petitioner and Respondent chose to be bound by New York law, and to submit all possible future disputes concerning the terms of the Stipulation to binding arbitration, Petitioner initiated a litigation against Respondent BURTON G. FRIEDLANDER in the Circuit Court of Cook County, Illinois (the "Illinois Court"). Petitioner alleged therein (1) that Respondent BURTON G. FRIEDLANDER owes substantial sums of money to her pursuant to the terms of the Stipulation and the Judgment; and (2) that he also has one or more additional liabilities to her.

On November 5, 1997, the Illinois Court made an Order staying further prosecution of Petitioner's action against Respondent and directing Petitioner to proceed to arbitration before the American Arbitration Association (the "AAA"), as agreed by the parties in Article XV of the Stipulation.

On November 13, 1997, Respondent BURTON G. FRIEDLANDER initiated an arbitration proceeding against Petitioner before the AAA at White Plains, New York. Rule 11 of the AAA's Commercial Arbitration Rules, entitled "Fixing of Locale," provides as follows:

> The parties may mutually agree on the locale where the arbitration is to be held. If any party requests that the hearing be held in a specific locale and the other party files no objection thereto within ten days after notice of the request has been sent to it by the AAA, the locale shall be the one requested. If a party objects to the locale requested by the other party, the AAA shall have the power to determine the locale and its decision shall be final and binding.

A formal notice of the initiation of the arbitration was actually received by Petitioner on November 19, 1997. Pursuant to Rule 11, Petitioner had 10 days to object to the White Plains, New York "locale" selected by Respondent BURTON G. FRIEDLANDER. She failed to make any objection to such locale within that time frame and thereby waived any objection she might otherwise have made to such locale.

Rule 39 of the AAA's Commercial Arbitration Rules, entitled "Extensions of Time," provides in relevant part that "The AAA . . . may for good cause extend any period of time established by these rules, except the time for making the award." On December 8, 1997, notwithstanding Petitioner's violation of Rule 11 of the AAA's Commercial Arbitration Rules, and her resulting waiver of any right she might otherwise have had to object to the White Plains, New York locale, the AAA informed Petitioner that it would permit her to state objections to the White Plains, New York locale "within ten (10) days from the date of this letter" (Pet. App. at 20[o] to 20[p]). Notwithstanding that generous extension of time, Petitioner failed to state such objections by the extended deadline.

On December 27, 1997, Petitioner served a lengthy set of papers in which she (1) objected to the White Plains, New York locale for the arbitration; and (2) interposed a counterclaim against Respondent BURTON G. FRIEDLANDER. Petitioner's counterclaim before the AAA comprised all alleged causes of action that were previously embraced in the litigation in the Illinois Court. Respondent BURTON G. FRIEDLANDER maintains, *inter alia*, that when Petitioner interposed such counterclaim, she voluntarily made the White Plains, New York arbitral forum *her* forum.

Notwithstanding Petitioner's failure to state objections to White Plains, New York as a proper locale for arbitration in a

timely manner, the AAA entertained her belated submission of objections thereto. On January 21, 1998, after considering the parties' respective contentions, including Petitioner's tardy objections, the AAA determined White Plains, New York to be the proper locale (Pet. App. at 20[t]).

Thereafter, Petitioner prosecuted an "appeal" to the AAA from its original determination on the question of locale. In effect, Petitioner asked the AAA to reconsider its original determination on the issue of locale.

On February 5, 1998, the AAA adhered to its original determination that White Plains, New York was the appropriate locale for the arbitration (Pet. App. at 20[u]).

B. Procedural History

On or about February 3, 1998, Petitioner commenced this action against the AAA and moved for preliminary injunctive relief. On February 12, 1998, Respondent BURTON G. FRIEDLANDER moved for leave to intervene (as a Defendant).

On February 12, 1998, the District Court (1) permitted Respondent BURTON G. FRIEDLANDER to intervene (Fed. R. Civ. P. 24[a] and/or [b]); (2) denied Petitioner's motion for an order enjoining and restraining the AAA from proceeding with the arbitration at White Plains, New York; and (3) granted oral motions made on behalf of the AAA and Respondent BURTON G. FRIEDLANDER, and summarily dismissed this civil action for lack of subject matter jurisdiction (Pet. App. at 20[b]).

Petitioner appealed to the United States Court of Appeals for the Seventh Circuit, and moved in that Court for injunctive relief. On March 2, 1998, the Court of Appeals (1) denied her

motion for equitable relief; (2) dispensed with formal briefing and oral argument; and (3) summarily affirmed the District Court's dismissal of this civil action (Pet. App. at 20[e] and 20[g]).[1]

Petitioner moved in the Court of Appeals for "reconsideration."[2] On March 23, 1998, the Seventh Circuit denied her application (Pet. App. at 20[f]).[3]

On Friday, June 19, 1998, Petitioner mailed her original Petition for a Writ of Certiorari to this Court. On Monday, June 22, 1998 — the very last day for filing — the Clerk of this Court received those papers. On June 26, 1998, the Clerk rejected those papers and returned them to Petitioner's attorney under cover of a letter setting forth multiple instances of non-compliance with this Court's Rules. The Clerk's letter of transmittal advised Petitioner's Counsel of Record that corrected papers would be deemed timely only if actually *received* by the Court within 60 days from the date of such letter. The Clerk's letter cited Rule 14.5 (concerning receipt of papers), and cautioned Petitioner that Rule 29.2 (concerning mailing of papers) would not apply.

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1. The Seventh Circuit's March 2, 1998 order affirming the judgment of the District Court is set forth on pages 20(e) and 20(g) of Petitioner's Appendix. The material on page 20(f) thereof pertains to Petitioner's request for a rehearing. See n.2, *infra*.

2. The Seventh Circuit's March 13, 1998 order denying Petitioner's motion for "reconsideration" is set forth on page 20(f) of Petitioner's Appendix. The proper nomenclature is "rehearing" (Rule 13.3 and Fed. R. App. P. 40).

3. Sunday, June 21, 1998, was the 90th day after the date of the Seventh Circuit's March 23, 1998, order denying Petitioner's motion for a rehearing. Accordingly, Petitioner's time to file a Petition for a Writ of Certiorari was extended to and including Monday, June 22, 1998 (Rule 30.1).

August 25, 1998 was the 60th day after the date of the Clerk's letter of June 26, 1998. On that date, at 11:30 p.m., the Court's Police Department "clocked in" Petitioner's revised papers. The alleged proof of service tendered to this Court along with such revised papers (pursuant to Rule 12.3) admitted that service of papers had *not* been effected "at or before the time of filing," as is required by Rule 29.3. In effect, such submission amounted to no more than a promise that such necessary service would be effected *in futuro*.[4]

REASONS FOR DENYING THE WRIT

I.

PETITIONER HAS FAILED TO INVOKE THIS COURT'S APPELLATE JURISDICTION IN A TIMELY MANNER.

The Constitution provides that the judicial power of the United States extends to certain enumerated Cases and Controversies (Art. III, §§ 1, 2); that this Court shall have original jurisdiction as to some of those Cases and Controversies; and that as to all the remaining Cases and Controversies, it "shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make" (Art. III, § 2).

---

4. Petitioner's undated "Proof of Service" was issued by Petitioner's Counsel of Record, EDWARD KAPLAN, ESQ., no later than August 25, 1998, as it was "clocked in" by the Court's Police Department on that date (at 11:30 p.m.). Although written unartfully in the past tense ("we served"), it alleges service *in futuro* (i.e., on August 26, 1998). In fact, such service was not made until two days later, on August 27, 1998; was made by mail; and was not received by Respondent BURTON G. FRIEDLANDER's counsel until August 28, 1998 (*see* Affidavit of MARK A. YOHANNA, ESQ., sworn to on September 23, 1998, lodged with this Court on this date).

Congress has exercised its power to control the Court's appellate jurisdiction. For example, it has directed that a petition for a writ of certiorari in a civil case must be filed within 90 days from the entry of the judgment below (28 U.S.C. § 2101[c]). This Court has held that such 90-day limit is mandatory and jurisdictional. *E.g., Missouri v. Jenkins,* 495 U.S. 33, 45, 110 S. Ct. 1651, 1660, 109 L. Ed. 2d 31, __ (1990).

This Court has directed that where a timely petition for a rehearing is filed in the court below, the 90-day deadline for filing a petition for a writ of certiorari shall be deemed to begin to run when the motion for a rehearing is denied (Rule 13.3). Respondent BURTON G. FRIEDLANDER does *not* raise any objection to the Petition based on Petitioner's application for "reconsideration" in the Court of Appeals.

Monday, June 22, 1998 would have been the last day for Petitioner to serve and file her Petition for a Writ of Certiorari, but this Court has delegated to the Clerk authority to extend that deadline for not more than 60 days where, as here, the Petition is submitted in good faith but is defective in form. *Cf.* 28 U.S.C. § 2101(c) (last sentence) and Rule 14.5.

In order to be *authorized* to file a petition for a writ of certiorari, a petitioner must submit proof of compliance with Rule 29.3 (*see* Rule 12.3). This amounts to proof that three copies of the petition were served upon each respondent *at or before* the time when the petition was tendered to the Clerk for filing.

This Court need not determine on this record whether the fact that service occurred after filing constitutes a jurisdictional defect. Perhaps a case will someday be presented to this Court in which the time to serve and file papers has not expired, and in which the papers will be filed first and served later. That is

not this case. Here, however, the time to seek review by way of a writ of certiorari expired *before* service of process occurred, and service was a prerequisite for such filing.

Where, as here, a petition for certiorari is tendered to the Clerk for filing in a timely manner, and the papers are accepted by the Clerk, but a petitioner was not authorized to file those papers with the Clerk because a mandatory condition precedent was not satisfied, the petition should be dismissed.

In *Federal Election Commission v. NRA Political Victory Fund,* 513 U.S. 88, 115 S. Ct. 537, 130 L. Ed. 2d 439 (1994), the petition for a writ of certiorari was filed in a timely manner, but the petitioner was not authorized to file the petition. Later on, after the deadline for filing had passed, the Solicitor General attempted to authorize the petition retroactively with *nunc pro tunc* effect. This Court rejected that effort.

This Court should distinguish cases in which the manner of service was challenged and cases in which the form of proof of service was challenged. Here, service of the papers — which was a prerequisite to the filing of the papers — did not take place until *after* the statutory deadline. Congress has exercised its constitutional authority to regulate this Court's appellate jurisdiction, and has expressly deprived this Court of any discretion to overlook Petitioner's default.

II.

TO THE EXTENT THAT PETITIONER COMPLAINS OF A DEPRIVATION OF LIBERTY OR PROPERTY WITHOUT DUE PROCESS OF LAW, SUCH ALLEGED DEPRIVATION WAS AT THE HANDS OF THE AAA, A PRIVATE, NON-GOVERNMENTAL ENTITY SELECTED BY PETITIONER HERSELF AS THE ARBITER OF ALL POTENTIAL FUTURE DISPUTES BETWEEN THE PARTIES.

Assuming *arguendo* that Petitioner's application has been presented to this Court in a timely manner, to the extent that Petitioner alleges one or more violations of her rights under the Due Process Clause of the Fourteenth Amendment, she attempts to invoke federal question jurisdiction (28 U.S.C. § 1331).

The Due Process Clause of the Fourteenth Amendment provides that no *State* shall deprive any person of life, liberty, or property without due process of law. The Due Process Clause does not reach the conduct of private, non-governmental entities such as the AAA. On this issue, Respondent BURTON G. FRIEDLANDER respectfully defers to the arguments advanced to this Court on behalf of the AAA by its counsel.

III.

TO THE EXTENT THAT PETITIONER COMPLAINS OF THE COMMISSION OF ONE OR MORE ALLEGED TORTS AGAINST HER BY THE AAA, AND/OR ONE OR MORE BREACHES OF CONTRACT BY THE AAA, THIS COURT LACKS SUBJECT MATTER JURISDICTION BECAUSE PETITIONER HAS NOT ALLEGED, AND CANNOT DEMONSTRATE, THAT THE REQUISITE AMOUNT IS IN CONTROVERSY.

Assuming *arguendo* that Petitioner's application has been presented to this Court in a timely manner, to the extent that it alleges a tort of "outrage" (also known as "intentional infliction of severe emotional distress"), and/or one or more breaches of contract by the AAA, she attempts to invoke diversity-of-citizenship jurisdiction (28 U.S.C. § 1332[a]).

Although Respondent BURTON G. FRIEDLANDER concedes that diversity of citizenship exists, he does *not* concede that diversity-of-citizenship jurisdiction exists. Such jurisdiction is limited to those cases in which "the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs. . . ." (28 U.S.C. § 1332[a]).

This Court should find that the amount in dispute between Petitioner and Respondent BURTON G. FRIEDLANDER is smaller than the minimum jurisdictional amount. For this purpose the proper measure of the injury to Petitioner, if any, is the increased expense she will incur, if any, to present her case in the designated locale (White Plains, New York) as opposed to her preferred locale (Chicago, Illinois). *S.J. Groves & Sons Co. v. American Arbitration Association,* 452 F. Supp. 121 (D. Minn. 1978). It is a virtual certainty that Petitioner will not incur at least $75,000 in additional expenses to present

her case at White Plains, New York as opposed to Chicago, Illinois. Nothing in this record supports any other conclusion, and the Court of Appeals perceived no need to entertain additional proofs (28 U.S.C. § 2108).

IV.

EVEN IF THE DISTRICT COURT HAD SUBJECT MATTER JURISDICTION TO DETERMINE THE MERITS OF THIS CONTROVERSY, IT PROPERLY DECLINED TO INTERFERE WITH THE AAA'S INTERLOCUTORY DETERMINATION ON THE ISSUE OF LOCALE.

Bearing in mind that the parties agreed in the Stipulation to be bound by New York law and that Supreme Court, Westchester County, approved their agreement, the District Court and the Court of Appeals correctly declined to overturn the AAA's determination of the preliminary issue of locale.

Under well-established New York law, courts generally may not entertain interlocutory challenges to rulings of arbitrators concerning the locale for arbitration hearings.

In *Royal Globe Ins. Co. v. Spain,* 36 A.D. 2d 632, 319 N.Y.S. 2d 115 (2d Dept. 1971) (mem.), arbitrators determined New York to be the proper locale for an arbitration. Dissatisfied with that determination, one of the parties commenced a special proceeding under CPLR Article 75 to stay the arbitration. The trial court granted that petition to the extent of directing the arbitration to proceed in Connecticut, rather than in New York as determined by the arbitrators. The Appellate Division reversed, dismissed the petition to stay the arbitration, and held that the contract between the parties authorized the arbitrators

to determine locale. Significantly, the AAA was the arbitration forum in *Royal Globe,* and the rules that governed there were the same as the rules that govern here.

Five years later, in *D.M.C. Construction Corp. v. A. Leo Nash Steel Corp.,* 51 A.D.2d 1040, 381 N.Y.S. 2d 325 (2d Dept. 1976) (mem.), Supreme Court, Kings County, reviewed and revised the AAA's determination that Buffalo, New York should be the locale for the arbitration. On appeal, a divided panel of the Appellate Division affirmed that order by a vote of 3-2. A majority of the panel issued a one-sentence memorandum explaining its reasoning:

> We find ample ground for Special Term's appropriate exercise of its discretion to have the arbitration proceeding conducted in the city in which the records are located and to avoid unnecessary hardship and needless expense to parties, witnesses, etc.

51 A.D. 2d at 1040, 381 N.Y.S. 2d at 325.

The dissenters joined in a lengthy analysis of the issue and reasoned as follows:

> Bearing in mind that the purpose of arbitration is to keep the parties out of court litigation, it would be an unseemly application of arbitration law to hold that a court may review the exercise of discretion by arbitrators as to the site of an arbitration hearing even though the parties agreed that if a dispute should arise between them as to such site, that the determination of that issue would be for the arbitrators and that their determination would be final and binding. Such a holding would fly in the

> face of the very purposes of arbitration agreements, one of which is the summary disposition of disputes without involving the parties in court litigation.
>
> [I]n the absence of some indication of fraud or other cognizable dereliction, a court has no power to interfere with a determination by an arbitrator as to where the arbitration hearings are to be held when the parties have affirmatively agreed that the determination of the arbitrators in that regard shall be final and binding [citing *Royal Globe*].

51 A.D. 2d at 1042, 381 N.Y.S. 2d at 327. The dissenters opined that the record before them contained no proof of bad faith on the part of the AAA, and no proof that the parties were not accorded a fair hearing on their respective contentions as to venue. 51 A.D. 2d at 1043, 381 N.Y.S. 2d at 328.

Permission to appeal to the Court of Appeals was granted by the Appellate Division. Thereafter, New York's highest court *reversed* summarily and "on the dissenting opinion" at the Appellate Division. 41 N.Y. 2d 855, 393 N.Y.S. 2d 709, 362 N.E. 2d 260 (1977).

In *Stevens v. Coudert Bros.*, 242 A.D. 2d 454, 662 N.Y.S. 2d 42 (1st Dept. 1997) (mem.), the Appellate Division made the following observation:

> [C]ourts should proceed with "great caution" in interfering with the processes of the selected tribunal, particularly with respect to procedural threshold questions such as venue [citing *D.M.C.*].

Ultimately, the Court held that the reference of the dispute as to the locale for the arbitration to the AAA was proper.

In *State Farm Ins. Co. v. McManus*, __ A.D. 2d __, 670 N.Y.S. 2d 599 (2d Dept. 1998) (mem.), the trial court changed the locale of an arbitration, but the Appellate Division modified the order so as to reverse that determination:

> The Supreme Court erred in determining that the petitioner insurance carrier was entitled to change the venue of the arbitration hearing. Pursuant to the American Arbitration Association rules, the arbitrator is to select the location of the hearing, and the petitioner failed to demonstrate that the arbitrator violated any of the applicable rules in selecting the location. In addition, courts are generally without power to void the determination of an arbitrator in the selection of the venue of an arbitration proceeding [citing *D.M.C.*].

__ A.D.2d __, 670 N.Y.S. 2d 600.

These authorities demonstrate that New York law is clear. Our research has not unearthed any New York case in which a trial court vetoed the locale selected by an arbitrator and was affirmed on an appeal.

In *Aerojet-General Corp. v. American Arbitration Association*, 478 F.2d 248 (9th Cir. 1973), the court said the following:

> [A] ruling fixing the place for hearing may cause irreparable harm to one or more of the parties. As this court noted in Pacific Car & Foundry v. Pence, 403 F.2d 949 (9th Cir. 1968), error in denying a change of venue cannot effectively be remedied on appeal from the final judgment. Extreme cases can be imagined in which the choice of locale for

> arbitration is not made in good faith and severe irreparable injury is inflicted on one or more of the parties. In such case the courts should be free to prevent a manifest injustice. For this reason we decline to hold that immediate judicial review of a ruling setting the place for arbitration is never justified. [Citation omitted.] Only an extreme case could warrant such judicial review, and this is emphatically not such a case.

478 F.2d at 251.

It is significant that the dissenting opinion at the Appellate Division in *D.M.C.* — which was later adopted by the New York Court of Appeals — expressly acknowledged the opinion of the Ninth Circuit in *Aerojet*. 51 A.D. 2d at 1042-43, 381 N.Y.S. 2d at 328.

Aerojet was followed by the First Circuit in *Seguro de Servicio de Salud de Puerto Rico v. McAuto Systems Group, Inc.*, 878 F.2d 5, 9 n.6 (1st Cir. 1989), a case governed by the Federal Arbitration Act. The Second Circuit has not yet ruled on this precise issue. *Michaels v. Mariforum Shipping, S.A.*, 624 F.2d 411, 415 n.5 (2d Cir. 1980).

The disposition of this action by the District Court and the Court of Appeals is consistent with New York law. Further, New York law is in harmony with *Aerojet* and its limited progeny. There is, therefore, no good reason for this Court to grant the Petition (*see* Rule 10).

Petitioner will not be deprived of an appropriate remedy. When the arbitrators deliver an award, Petitioner may seek judicial confirmation (N.Y. CPLR 7510), or may seek vacatur or modification (N.Y. CPLR 7511). Until then, this is not a justiciable case or controversy.

CONCLUSION

For the reasons stated above, the Petition should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — AFFIDAVIT OF MARK A. YOHANNA, SWORN TO ON SEPTEMBER 23, 1998

(Omitted here but submitted separately as Lodging Appendix)

Supreme Court, U.S.
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No. 98-334

In The
Supreme Court of the United States

October Term 1998

MARIS FREED,
f/k/a MARIS FRIEDLANDER,
Petitioner,

v.

AMERICAN ARBITRATION ASSOCIATION,
a New York not-for-profit Corporation,-and
BURTON G. FRIEDLANDER,
Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
for The Seventh Circuit

AMERICAN ARBITRATION ASSOCIATION'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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September 25, 1998

16 pp

QUESTION PRESENTED FOR REVIEW IF PETITION FOR WRIT OF CERTIORARI WERE GRANTED

Were this Court to grant petitioner's Petition For Writ Of Certiorari, only one question would be presented for review: Did the petitioner's Complaint state a claim for violation of the Fourteenth Amendment's guarantee of due process of law by alleging that the American Arbitration Association failed to state reasons for its decision not to change the locale of an arbitration from New York to Chicago?

RULE 29.6 STATEMENT

Respondent the American Arbitration Association ("AAA") is a private New York not-for-profit corporation. The AAA has no parent or subsidiary companies.

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CONSTITUTIONAL PROVISIONS AND OTHER STATUTES

The section of the Petition For Writ of Certiorari filed by Petitioner Maris Freed ("Freed") that purportedly sets out the "Constitutional Provisions, Treaties [etc] Involved" [Petition at 2-9] also contains argument.[1/] We respond to that argument in the Argument section of this Brief.

[1/] As used herein, "Petition" refers to Freed's Petition For Writ Of Certiorari. "Pet.App." refers to the Appendix attached to Freed's Petition. "R." refers to the record on appeal in the Seventh Circuit.

STATEMENT OF THE CASE

This case involves the decision by the AAA not to change the locale of an arbitration from New York, where the demand for arbitration was filed, to Chicago, where Freed wanted the locale to be.[2/] In the late 1970's Petitioner Freed and her former husband, Burton Friedlander ("Burton"), entered into an agreement that became part of their divorce decree entered by the New York court. [R.1, Complaint ¶12 and Ex.1.] That agreement included a clause specifying that disputes arising thereunder would be arbitrated pursuant to the AAA Commercial Arbitration Rules. [R.1, Complaint Ex.1.] In November 1997, Burton filed in the White Plains, New York office of the AAA a demand for arbitration of disputes between Freed and Burton arising from that agreement. [R.1, Complaint Ex.1.]

Freed, who wanted the arbitration locale to be in Chicago, objected to New York as the locale for the arbitration. [R.1, Complaint ¶31.] Rule 11 of the AAA's Commercial Arbitration Rules [quoted in Petition at 3], which was adopted by Freed and Burton, provides, in part:

2/ Because this case was dismissed by the District Court before responsive pleadings were filed, the statement of background facts is based on the Complaint filed by Petitioner Freed in the District Court. [R.1] Portions, but not all, of that Complaint, are included in the Appendix to the Petition at Pet. App. Ex. VII at 20(q)-(s). The AAA does not admit the truth of any of the factual statements or legal conclusions alleged in that Complaint.

> If a party objects to the locale requested by the other party, the AAA shall have the power to determine the locale.

The AAA considered but overruled Freed's request for a Chicago locale. [R.1, Complaint ¶32; Pet. App. Ex. VII at 20 (t).] Freed filed an appeal and request for reconsideration with the AAA. [R.1, Complaint ¶32; Pet. App. Ex. VIII at 20 (u).] The AAA considered Freed's request for reconsideration but denied it. [Ibid.] Freed then filed a Complaint in the United States District Court for the Northern District of Illinois, claiming that she was "not attacking the AAA's decision per se" but rather the fact that the AAA did not give the reasons for its decision to overrule her locale request. [R.1, Complaint ¶35-36, Pet. App. Ex.VII at 20(r).] Freed's Complaint alleged in Count I that the AAA's failure to state its reasons violated her "constitutional and due process rights and privileges" and in Count II that such alleged deprivation of due process constituted a tort and "an outrage" to Freed. [R.1, Complaint ¶¶ 35-36, 39, Pet. App. Ex. VII at 20(r)-(s); R.1, Complaint ¶ 40.]

The District Court dismissed Freed's Complaint on an oral motion. [R.4, Pet.App. II at 20 (c); IV at 20 (d).] The Court of Appeals for the Seventh Circuit summarily affirmed that dismissal without requiring the submission of briefs. [Pet. App. Ex. V at 20(e), Ex. VI at 20 (g).] The Seventh Circuit also denied Freed's motion for reconsideration. [Pet. App. Ex. VI at 20(f).]

ARGUMENT

REASONS FOR DENYING THE WRIT

The AAA's administration of the arbitration between Freed and Burton pursuant to the parties' private contract for arbitration is not state action. The AAA Rules, to which the parties agreed, provide that the AAA shall determine the locale of an arbitration. Neither those Rules nor any ruling of this Court or any of the courts of appeals requires that the AAA state reasons for its locale decision.

Both the District Court and the Court of Appeals correctly recognized that Freed did not state any claim for violation of her rights under the Fourteenth Amendment, and properly and summarily dismissed her Complaint. The decision of the courts below is consistent with well-established law, including precedent from this Court. Freed's Petition raises none of the considerations listed in Rule 10 of this Court's Rules as a reason for granting a writ of certiorari. The Petition should be denied.

I. The AAA's Administration Of The Parties' Private Contract For Arbitration Is Not "State Action"

Freed's Complaint attempts to state a claim against a private party, the AAA, for alleged violation of her constitutional rights. This Court has stated:

> Embedded in our Fourteenth Amendment jurisprudence is a dichotomy between state action, which is subject to scrutiny under the

> Amendment's Due Process Clause, and private conduct, against which the Amendment affords no shield, no matter how unfair that conduct may be.

National Collegiate Athletic Assn. v. Tarkanian, 488 U.S. 179, 191, 102 L. Ed. 469, 484 (1988), citations and footnote omitted.

In this case, the AAA is administering the arbitration between Freed and her former husband pursuant to the parties' private agreement to arbitrate that incorporated the AAA's Commercial Arbitration Rules. Arbitration statutes enacted by New York and other states do not make private arbitrations "state action." Like the Federal Arbitration Act, 9 U.S.C.§ 1, et seq., those statutes simply make enforceable the parties' agreement to arbitrate under the rules to which the parties have agreed.

> There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate.

Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior Univ., 489 U.S. 468, 476, 103 L. Ed. 2d 488, 498 (1989).

In contrast, *Perry v. Sindermann*, 408 U.S. 593, 33 L. Ed. 2d 570 (1972), upon which Freed relies [Petition at 6-9], involved clear state action: the firing of a teacher employed by a state college.

The actions of the AAA in administering the arbitration between Freed and her former husband are not state action subject to scrutiny under the Fourteenth Amendment. Freed's claim that the AAA failed to give reasons for its decision as to the locale of the arbitration does not allege any violation of constitutionally protected rights.

II. Freed Has No Right Under The AAA Rules Or Under Law For A Statement Of Reasons For The AAA's Locale Decision

Freed's Petition should also be denied because its fundamental argument -- that the AAA is obligated to provide reasons for its locale decision -- is not correct. Freed's Complaint acknowledges:

> The [parties'] arbitration agreement . . . did not provide where the arbitration hearings would be held. As a result, Rule 11 of the Association provided that location would be determined by the Association.

[R. 1, Complaint ¶12.]

While Freed argues that the AAA "was contractually obligated to provide her with those grounds and reasons" for its locale decision [Petition at 12], she cites no factual basis for that argument. She also fails to provide a legal or factual basis for her argument that such an obligation should be implied as part of any alleged contract. [Petition at 5-6.] There is no basis for her argument.

Indeed, Freed's Petition [at 8] acknowledges New York precedents holding that arbitrators do not need to give grounds and reasons for their decisions. That view is consistent with authorities around the country, including precedent from this Court. Quoting *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 203 (1956) and *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (1960), a respected authority on arbitration law has stated:

> The courts have left little doubt in this area. The United States Supreme Court has ruled that "arbitrators need not disclose the facts or reasons behind their award," and "arbitrators have no obligation to the court to give their reasons for an award."

Domke Comm Arbitration, §29:06 at 436 (Rev Ed). *Accord Prudential-Bache Securities, Inc. v. Tanner*, 72 F.3d 234 (1st Cir. 1995); *Wall Street Assoc's, L.P. v. Becker Paribas, Inc.*, 27 F.3d 845 (2d Cir. 1994); *Robbins v. Day*, 954 F.2d 679 (11th Cir. 1992); *A.G.Edwards & Sons, Inc. v. McCollough*, 967 F.2d 1401 (9th Cir. 1992); *Eljer Mfg., Inc. v. Kowin Development Corp.*, 14 F.3d 1250 (7th Cir. 1994).

The well-established principle that arbitrators need not state reasons for their awards gives no support to Freed's claim that the AAA has an obligation to state reasons for its decision regarding the locale for the arbitration.

Furthermore, Freed's Complaint begs the question of what purpose would be served by requiring the AAA to

identify reasons for administrative decisions such as locale. The obvious purpose of the AAA Rules is to expedite the process of setting up the arbitration hearings. Requiring the AAA to state reasons for administrative decisions would encourage a party like Freed who is unhappy with the decision to bring a lawsuit challenging it. Such collateral lawsuits would be pointless, since the parties, by adopting the AAA Rules, have agreed that the AAA should make the final locale decision. They would also defeat the purpose of the original arbitration agreement and of the Federal Arbitration Act and similar arbitration statutes to keep the dispute out of the courts. In any event, both parties were given an opportunity to be heard and to submit their contentions to the AAA before a decision was made.

III. There Is No Reason For Review On Certiorari

Freed's Petition raises no new or important issue for this Court. The decisions below are consistent with existing precedent, the policy of the federal and state arbitration acts and common sense. There is no reason for reviewing the Seventh Circuit's decision.

CONCLUSION

For the foregoing reasons, the American Arbitration Association respectfully requests the Court to deny the Petition.

Dated: September 25, 1998

Respectfully submitted,

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Supreme Court, U.S.
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No. 98-334

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1997

MARIS FRIEDLANDER n/k/a
MARIS FREED

Petitioner,

v.

AMERICAN ARBITRATION ASSOCIATION,
A New York Not-for-Profit Corporation
and BURTON G. FRIEDLANDER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITIONERS REPLY TO RESPONDENT, AAA, BRIEF IN OPPOSITION TO PETITIONERS PETITION FOR WRIT OF CERTIORARI

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Petitioner's Reply To Respondent AAA Statement of the Case

AAA omits mentioning that it also had a contractual obligation to Petitioner to give grounds and reasons for locating arbitration in White Plains, New York (pp. 5, 10, 12-16, 19 of the Petition].

Noteworthy is the fact that AAA did not object to the timeliness of Petitioner's locale objections filed with AAA, thereby conceding their timeliness, whereas Friedlander, without merit, did object to such timeliness [pp. 4-5, Friedlander's Brief in Opposition to the Petition].

AAA Argument

Reasons for Denying Writ

AAA concedes that its administration of arbitration between Petitioner/Friedlander occurs pursuant to their private contract for arbitration with AAA [p. 3-7, AAA Brief in Opposition to the Petition]. Petitioner paid and will pay additional, large sums of money to AAA for its arbitration services and expected and was entitled to expect grounds and reasons for decisions rendered by AAA in the course of arbitration. However, AAA refused to give grounds and reasons for its location [venue] decision.

Contractually Petitioner/AAA bargained for being given grounds and reasons in return for paying and agreeing to pay AAA the aforementioned, substantial sums of money for its arbitration services. See pp. 5, 10, 12-16, 19 of Petitioner's Certiorari Writ where this is discussed in detail.

Friedlander's written demand for arbitration to White Plains [submitted by him November 13, 1997] does not contain provisions eliminating and not requiring grounds and reasons for

AAA decisions. Additionally, there are no written or other undertakings between any of the parties and AAA permitting it to refrain from giving grounds and reasons for its decisions. On a strictly contractual basis, AAA is not permitted to refuse to give grounds and reasons as it must be said that these were bargained for by the parties and AAA, especially where the parties paid and are to pay additional and substantial moneys to AAA for its services. It cannot be said under the circumstances that AAA did not commit itself to give such grounds and reasons. [See pp. 5, 10, 12, 16, 19 of the Petition].

I. AAA's Administration of the Parties Private Contract Involves State Action

The New York Arbitration Statute, Ch. 75, CPLR §7501-7514 [App. VII to Petition] is a State Statute which does not contain provisions [nor can it be so interpreted] permitting AAA to refrain from giving grounds and reasons for its decisions. New York Court's have interpreted that statute [pp. 8 of Petition] as not requiring AAA to give such grounds and reasons. State action by those New York Courts, a clear 14th Amendment, due process circumstance, is explained in the Petition [pp. 5-9 thereof]. AAA followed those New York State Court decisions [which violated Petitioners due process rights under the 14th Amendment] by condoning AAA's refusal to give grounds and reasons.

AAA refers to the Federal Arbitration Act, 9USC §1, et seq. [p. 4 of AAA in Opposition]when that is not applicable. If anything, the New York Arbitration Statute is applicable. Federal policy regarding arbitration [referred to at p. 4 of AAA Brief in Opposition] is not the standard and such is misstated by AAA.

II. Petitioner has Rights Through Its Agreement With AAA For AAA To Give Grounds and Reasons For Its Decisions

AAA ignores here the fact that it notified counsel for the parties on December 8, 1997 that "in determining hearings location the following factors [8 substantial factors] are viewed by AAA as significant in determining locale" [pp. 4-5 of the Petition; pp. 20(o) and 20(p), App. to Petition.

That December 8, 1997 letter itself indicated AAA would consider those "8 significant factors." Having so stated, it is a clear indication of AAA's responsibility to give such grounds and reasons, or why ask the parties to supply material regarding the 8 significant factors.

AAA states [p. 5 of its Brief in Opposition],

> *"...As a result, Rule 11 of the Association provided that* location would be determined by the Association."

Yes, but determined by AAA in conjunction with considering materials submitted to it by the parties on the 8 significant factors. Why ask for such information if the parties are not given grounds and reasons for AAA's location decision. These matters were not intended to be kept secret, silent or confidential.

III. There Is Good Reason For Review on Certiorari

AAA "boasts" about providing "Dispute Resolution Worldwide" [pp. 20(o), of Appendix to Petition]. That doesn't tell anyone that AAA will not give grounds and reasons for its decisions, quite the contrary.

The issue is so broad and all pervasive that Certiorari is required to determine it.

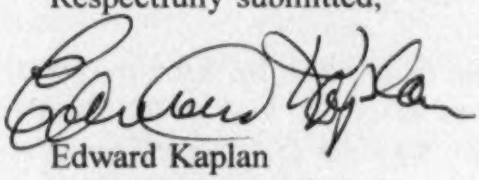
Petitioner's Conclusion

Petitioner again reiterates that need for resolution of the foregoing is plain and compelling. Petitioner asks this Court to revisit the matters raised in the Petition, this Reply and Opposing briefs.

To our knowledge and research the contractual issue visa via petitioner/AAA has not been considered. Likewise, Petitioner's 14th Amendment arguments have never been taken into account concerning her perceptions of State action.

We therefore respectfully ask this Honorable Court to consider the national and international impact AAA exercises on persons, firms, commerce, and industry by its own claims, and advertising grant Petitioner's Petition for a Write of Certiorari.

Respectfully submitted,



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